

IN THE MATTER OF ROSS JOHN FAZIO,
A Member of the State Bar of Michigan,
Respondent
No. DP-105/80
No. DP-143/80

Decided: July 6, 1981

OPINION OF THE BOARD

Respondent was charged with neglect in failure to close an estate, and failure to answer a Request for Investigation. Wayne Circuit Hearing Panel "P" granted the Grievance Administrator's Motion for Summary Judgment when Respondent admitted the charges. Respondent was allowed to enter statements in mitigation, and was suspended for thirty days. Respondent petitions for review on the ground that the panel did not properly consider the evidence in mitigation. Taking all factors into consideration, we reduce discipline to a reprimand.

Respondent was retained by Complainant in 1972 to probate an estate. In 1973 Respondent filed a petition for administration and was appointed administrator of the estate. An inventory was filed, but in 1974 Respondent's status as administrator was revoked for his failure to file an accounting. In 1978 he was restored as administrator when the first accounting was filed.

In mitigation, Respondent set out for the panel the services he had performed on the estate, including preparation and transfer of title to a vehicle, certain real estate, and cemetery lots. Panel tr. at 7-8. Respondent outlined his accountings and explained that he was waiting for tax refunds to the estate. *Id.* at 8-9. He claimed that part of the delay was caused by misplacement of a portion of the file with other files from the same family, but admitted there was no excusable reason for the delay. *Id.* at 12. Other than refunds, all the assets of the estate had been assigned. *Id.* at 15. Respondent also told the panel that he contacted the grievance Commission by telephone after receiving the Request for Investigation. *Id.* at 11. In its Report, the panel stated that it found none of the statements to be mitigating. *Id.* at 23.

Mitigation may be defined as circumstances "such as do not constitute a justification or excuse of the offense in question, but which, in fairness and mercy, may be considered as extenuating or reducing the degree of [Respondent's] moral culpability." Louisiana State Bar Association v Shaheen, 338 So 2d 1347, 1351 (La. 1976); Heaton v Wright, 10 How. Pr. 79, 82 (N.Y. 1854). Some factors to be considered include the character of the misconduct, evidence of the attorney's reputation, his family and personal circumstances, and similar matters. Louisiana State Bar Association v Loridans, 338 So 2d 1338 (La. 1976).

Among the mitigating circumstances present here are that Respondent was not dismissed, but continued in the employ of the Complainants during the period of neglect; In re Greenspan, Nos. 34209-A; 35057-A (Mich. St. B. Grievance Bd. 1978); Respondent's twenty-three years of unblemished practice; In re Buk, No. 35947-A (Mich. Att'y Discip. Bd. 1979); In re Shirley, No. 35976-A (Mich. Att'y Discip. Bd. 1979) (per curiam); In re Moore, No. 35620-A (Mich. Att'y Discip. Bd. 1979); In re O'Brien, No. 33975-A (Mich. Att'y Discip. Bd. 1978); In re Swainson, No. 34144-A (Mich. St. B. Grievance Bd. 1978) (per curiam); In re Charlip, No. 26340-A (Mich. St. B. Grievance Bd. 1976) (per curiam); and his acknowledgment of neglect, Shirley, *supra*. It is also considered in mitigation that the estate in question has all but been closed, Bd. tr. at 5-6. The final accounting has been filed and approved by the probate judge *Id.* at 6. We note that the Grievance Administrator has chosen not to oppose a modification of discipline *Id.* at 17.

The instant case is quite similar to O'Brien, *supra*. There, Respondent was charged with misconduct concerning the accounting and progress of an estate. He admitted allegations of neglect

in his dilatory handling of the estate. A hearing panel found that the charges of neglect were proven, and suspended Respondent for ninety days. Respondent appealed, and the Board decreased discipline to a reprimand, due to the lack of fraudulent, deceitful, or misrepresentative conduct by Respondent, and due to substantial factors in mitigation.

Some of those factors were Respondent's payment from his own pocket of the interest and penalties assessed against the estate. That also occurred in the instant case, as Mr. Fazio paid \$450 in losses sustained by the estate. Bd. tr. at 12. The O'Brien Respondent retained assistant counsel to assist him in closing the estate. Although the delay here was substantial, Respondent had virtually completed the matter before another lawyer whom Complainants retained could assist. Id. at 5-6. The Respondents here and in O'Brien had long, unblemished records of practice. The Board affirms the findings of fact of the hearing panel, and reduces discipline to a reprimand. Respondent is to certify to the Board as soon as possible that the estate has actually been closed.

AFFIRMED AS MODIFIED.